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In the

Supreme Court of the United States

No. 69-5001

Lyman A. Moore, Petitioner,
v.
State of Illinois.

On Writ of Certiorari to the Supreme Court of Illinois.

PETITION FOR REHEARING

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Petitioner Lyman A. Moore respectfully prays for rehearing.

The affirmance of petitioner's conviction turns upon an interpretation of the following question and answer at the post-conviction hearing:

> "Q. And did you tell me and also later on, did you tell the policeman from the State's Attorney's Office that if you had known that this fellow, Lyman Moore, was in a Federal Penitentiary until March 4, 1962, you would definitely not have identified him as being Slick that you knew?

"A. If he's in jail, it would have been impossible to be the same man." (Typed post-conviction transcript 132-133, A. 296.)

The fact that prosecution witness Sanders misidentified petitioner Moore is conceded. The 5 to 4 split occurs when it comes to the meaning of that misidentification.

The majority holds that "the mistake was as to the identification of Moore as 'Slick', not as to the presence of Moore at the Ponderosa Tap on April 27." (Op. 9)

The minority holds that when Sanders was confronted with the fact that petitioner was in a federal prison at the time Sanders met the man known to him as "Slick," he "indicated that it was impossible that petitioner was the man with whom he had spoken in the Ponderosa tavern." (Dissent 5)

I.

As both opinions show, it is now clear that petitioner is certainly not "Slick," although the jury that convicted him obviously believed that he was. Sanders tried to prevent the misidentification before testifying by pointing out that "Slick" was 30 to 40 pounds heavier than petitioner Moore (A. 294) but was dissuaded from doing so by the callous comment in the presence of the prosecutors, "Well, you know how those jailhouse beans are." (A. 295)

At the post-conviction hearing, during cross examination by the Assistant State's Attorney, Sanders made it crystal-clear that the confessor in the Ponderosa Tap on April 27 was "Slick" and not petitioner Moore. *After* Sanders realized that petitioner and Slick could not have been the same man (A. 296) he persisted in referring to the man in the Ponderosa as "Slick," not petitioner:

"I went in the Ponderosa Bar there for a beer. And I saw two men in there. They were talking to the bartender. Then the guy called my name—the *guy I knew as 'Slick' called my name; he was one of the two guys.*" (A. 300, emphasis supplied.)

• • •

"Q. You didn't say you gave anybody a ride, but that you saw this fellow in the Ponderosa?

A. I saw the *guy I knew as 'Slick'* in the Ponderosa that day, that's right." (A. 304, emphasis supplied.)

II.

Virgle Sanders is the *only* prosecution witness that testified he knew the petitioner. The jury sat and watched and listened to Sanders identify petitioner Moore as a man he *knew,* a man he had seen a number of times, a man he knew only by the nickname "Slick" (A. 42), a man who on April 27, 1962, had heartlessly bragged and voluntarily confessed, "I shot a bartender in Lansing." (A. 47)

In a case that hinges on identification, the fact that the identifying witness knew the accused and had seen the accused on a number of previous occasions (A. 42) lends probative force to his testimony. That is why petitioner says that Sanders is the key prosecution witness. The jury did not hear Sanders utter the words, "If he's in jail, it would have been impossible to be the same man." (A. 296) The jury should have been afforded an opportunity to interpret what he meant.

The majority says the "mistake was as to the identification of Moore as 'Slick,' not as to the presence of Moore at the Ponderosa Tap on April 27." (Op. 9) But, the record reveals that Sanders was in the Ponderosa

as a customer; not as a bartender. (A. 300) The bragging confessor was well enough acquainted with Sanders to know his first name and the fact that Sanders worked part time as a bartender. *"Virgle,* it's open season on *bartenders."* (A. 300, 351, emphasis supplied.) "Slick" was a prior acquaintance of Sanders. Moore was not. Logic dictates that the braggart confessor in the Ponderosa was "Slick;" not petitioner Moore.

The Court apparently believed that "The reason that Sanders could remember the *first time* that he had met 'Slick' was that 'Slick' had been involved in a scuffle with one William Thompson." (Dissent 5, emphasis supplied.) But prior to the scuffle Sanders had seen "Slick" in Wanda and Del's Tavern on numerous occasions—he did not remember how many (A. 42) but that is where he saw him the most and the scuffle was on one of those occasions. (A. 293, 298) That inaccuracy might have caused the Court to overlook the fact that Sanders and "Slick" were well enough acquainted for "Slick" to know Sanders' first name and the fact that he worked part time as a bartender. Only an established acquaintance could have said, *"Virgle,* it's open season on *bartenders."* (A. 300, 351, emphasis supplied.) And that oversight may be why the opinion attaches so little significance to Sanders' admission on post-conviction that "If he's in jail, it would have been impossible to be the same man."

The majority says that "the elusive 'Slick' was an early lead the police abandoned when eyewitnesses to the killing and witnesses to Moore's presence at the Ponderosa were found." (Op. 9) But, the record reveals that the search for "Slick" did not *end* when witnesses to the Ponderosa incident were found; it *began* then. Lansing

Police Chief Braschler testified in the post-conviction hearing on January 12, 1967, that, "The name of 'Slick' came from Sanders." (A. 346) And far from abandoning "Slick" as an early lead, it was used at the trial. The jury was told that Moore was "Slick." (A. 42)

Indeed, during final arguments, the prosecutors told the jury that petitioner Moore was "Slick" (A. 162) and that Virgle Sanders had known him before (A. 203) and that petitioner knew Sanders was a bartender. (A. 205)

III.

The majority holds that Sanders' misidentification of Moore as "Slick" did not "destroy" the "positive" identifications of Hill, Powell, Joyce, and Fair. (Op. 12) Petitioner respectfully submits that the standard should be whether his misidentification and the evidence concealed that could have established his mistake at trial "may have had an effect on the outcome of the case."

But if those other witnesses were not "destroyed," neither can they be said to inspire mammoth confidence.

Patricia Hill

Over six months elapsed between the crime and the "identification" of petitioner Moore by Patricia Hill on November 1, 1962. (A. 144) She was the only one of 7 persons who had been summoned by the Lansing police to view that lineup that identified petitioner Moore. (A. 116) Patricia Hill had viewed a lineup on the night before in which petitioner Moore was present. She did not identify him at that time. (A. 145) Few things could be more suggestive than that kind of procedure. Petitioner

was precluded from developing the point on cross examination. (A. 31)

Henley Powell

Henley Powell "identified" petitioner Moore 25 months after the shooting. He was never invited to view the petitioner Moore until the day he testified in court. (A. 143) Petitioner was specifically precluded from establishing that fact before the jury on cross examination. (A. 37, 143) There is a statement in the State's Attorney's file obtained on January 10, 1967, in which Powell said (p. 3) that when he first saw petitioner in court "he was thinner, his cheek bones were protruding more than when he shot Bernie." (Cf. *Giles* v. *Maryland*, 386 U.S. 66, 82 n. 1, concurring opinion.)

Robert Fair

Robert Fair's testimony was so innocuous that it was considered irrelevant for purposes of the post-conviction hearing. At the trial, he testified only that petitioner "looks like one of the men" in the Ponderosa Tap. (A. 51) The man called "Slick" was a friend of Virgle Sanders, not Fair. Fair had never seen "Slick" before. (A. 53)

William Joyce

William Joyce identified petitioner Moore as the man who had a conversation with Virgle Sanders, but he paid no attention to it. (A. 39) At the time of the post-conviction hearing William Joyce was ill. The State stipulated to what he would testify to if available, but objected to materiality. (A. 348) It is as follows:

> That if William Joyce were called to testify he would testify in response to my cross examination

and this can be verified from the files that the Officer Don Moriarty of the State's Attorney's Police has from an interview of Joyce recently and Joyce will testify as follows, that there was a fellow in the Ponderosa Tap on the afternoon of April 27, 1962, and that he had a crew cut and he was dirty and he was boisterous and he was using foul language and that he had a Southern accent, and that he went to Bob Fair, the owner of the Ponderosa at the time, and he said to him, "Look, get this hill-billy the hell out of here or there is going to be trouble, he wants a ride to Harvey." Whereupon, Bill Fair took the man to Harvey and the next time that he saw anybody in connection with the incident, he saw one Lyman Moore and when he first laid eyes on him he said, "He sure looks different." He says when he saw him in the trial he looked like a minister's son.

One other thing, that he never in his lifetime has heard Lyman Moore talk, so he doesn't know what kind of an accent this Lyman Moore has.

The jury did not hear that when he first saw petitioner at trial he said "He sure looks different." (A. 349)

Petitioner respectfully submits that the issue is not whether the State's evidence has been "destroyed", but whether the concealed information might reasonably have affected the outcome of the original trial. To suggest that the prosecution may withhold any evidence which does not destroy the entirety of its case, is to render *Brady* completely meaningless.

Any competent trial lawyer, armed with the material then secreted, could have won an acquittal for Moore. As in almost all cases of acquittal, the remaining State witnesses would not have been "destroyed"; it would

simply have been impossible to believe them beyond a reasonable doubt in the light of those facts. Their original observational opportunities, added to the lengthy time gap between observation and identification, renders them weak targets for any defense lawyer armed with the inconsistent facts now available.

IV.

A criminal trial has been referred to as a search for the truth. *Williams* v. *Florida*, 399 U.S. 78, at 82. And Due Process of Law, whatever else it means, ought to be considered a double-track railroad. If Sanders' identification of petitioner Moore as "Slick" was material at his trial, then the concession that Sanders was mistaken in identifying petitioner Moore as "Slick" (Op. 9, 10) ought to be presented to the jury on a new trial.

V.

This Petition for Rehearing should be granted, limited to the grounds above urged, and set down for reargument on the summary calendar.

Respectfully submitted,

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Certificate Of Counsel

I certify that this petition is presented in good faith and not for delay.

/s/ James J. Doherty

July 22, 1972.